with the respondent that the facts in our case are quite different from the facts in the cases cited earlier. Much was made of the word "furnished" in (P.2) by the 1st defendant. It was argued that (P.2) is meant to indemnify guarantees issued prior to July 23, 1964. In his evidence 4th defendant mentioned that there were so many guarantees to sign. Every time a guarantee was signed it was backed up with a resolution which contained an indemnity by the company to the individual directors who signed the guarantee. For example, at page 105 of the Appeal Record the word "furnished" was also used in (D.19), an indemnity given by the 2nd defendant company. The word "furnished" could apply to the past or the future. It need not necessarily refer to guarantees already issued. The oral assurance given by the directors has also to be considered. It is the submission of the appellant that this is a matter of construction. It may be useful to refer to (D.19) which was dated April 22, 1966. This resolution was intended to be an indemnity given to the guarantors to sign (P.1). The word "furnished" was also used but the guarantee (P.1) was not given until January 25, 1967.

Where there is ambiguity the court can ascertain the intention. *Odgers* on Construction of Deeds and Statutes 5th Edition, at page 31 reads:–

"Rule II. The intention may prevail over the words used.

Ordinarily, parties use apt words to express their intention: but often they do not. The cardinal rule again is that clear and unambiguous words prevail over any intention, but if the words used are not clear and unambiguous, the intention will prevail. We have seen that the most essential thing is to collect the intention of the parties from the expressions they have used in the deed itself. What if the intention so collected will not square with the words used? The answer is that the intention prevails."

The submission of the appellant is that (P.2) is not confined to guarantees prior to the date of resolution. The facts speak for themselves.

(P.2) is a resolution made pursuant to Article 91 of the Articles of Association of the appellant. The intention is clear. As the learned Judge correctly pointed out at page 112 of the Appeal Record that "it is common ground that the resolution is not to be taken as a personal indemnity from the directors. I agree with counsel that this is the correct view to take – a circular resolution passed under the provisions of the articles of association of a company in the form it takes in (P.2) cannot be said to be a personal indemnity themselves. In this case (P.2) has to have effect as an indemnity from the first defendant company." They may not meet formally in signing (P.2). But it is clear beyond doubt that (P.2) did represent a meeting of minds which is, after all, the essence of a meeting and the passing of a resolution.

The learned Judge has dealt with the matter very carefully, in particular, the evidence of John Eu (4th defendant). He was satisfied that there was no reason for (P.2) to be qualified by the words "prior to the date of (P.2)". We agree with the learned Judge that the real reason for making (P.2) as given by the 4th defendant was to make Richard Eu (3rd defendant) bear his part of the liabilities as he was not a shareholder or director in the subsidiary companies.

For reasons given, we would dismiss the appeal with costs. Deposit to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Abdul Aziz Ong & Co.; Rithaudeen & Aziz.*

SUGUMAR v. KUI CHIN

[A.C.J. (Wan Mohamed J., Mohamad Zain Kinsung and John Majimbun) January 28, 1981]
[Kota Kinabalu – Native Court of Appeal No. 7 of 1980]

Native Law and Custom – Charges of being found together with another person's wife – Appellant embraced Islam – Jurisdiction of Court – Appellant not a native – No sanction of District officer – Native Courts Ordinance, (Cap. 86), s. 5, 6 & 10.

In this case the appellant was found guilty in the Penampong Native Court on two charges (1) found to be sitting together with the wife of the respondent in a car belonging to the respondent's wife at about 12.35 p.m. on July 16, 1980; (2) found together with the respondent's wife in the respondent's house when respondent was not in on July 22, 1980. The appeal of the appellant to the District Officer was dismissed and he appealed to the Native Court of appeal. The appellant and the respondent's wife claimed to have embraced Islam on July 21, 1980. The appellant was not a native.

Held: (1) the mode of inquiry or proceedings in the native court is left entirely in the hands of the adjudicators in accordance with custom or usual practice;

(2) the general principle of Islamic Law is that if a husband or wife were to embrace Islam and his/her spouse refused within three months and ten days to be converted to Islam after being offered to embrace Islam, the marriage of such husband or wife is dissolved. However there must be an adjudicating order or declaration of such dissolution of marriage on account of the refusal of the spouse to embrace Islam. In this case there is no evidence of an adjudicating order or declaration made as to the dissolution of the marriage between respondent and his wife. At any rate it is impossible for an adjudicating order or declaration to be made a day after the respondent's wife embraced Islam.

(3) the Native Court found that the respondent and his wife at the material time legally remained as husband and wife. The Native Court had therefore jurisdiction over the appellant in respect of the second offence;

(4) no valid sanction was given in this case for the institution of legal proceedings in the Native Court against the appellant who was not a native and therefore the proceedings in the Native Court were null and void.

Cases referred to:

(1) *B.M. Harley* v. *Onong binte Ah Hing, Lee Hun Hoe.* Cases on Native Customary Law in Sabah, 168, 171.

(2) *Public Prosecutor* v. *Oie Hee Koi & Associated Appeals* [1968] 1 M.L.J. 148, 154.

(3) *Yek Tieng Sing & Ors.* v. *Public Prosecutor* [1971] 2 M.L.J. 94.

(4) *Thorpe* v. *Priestnall* [1897] 1 Q.B. 159.

NATIVE COURT OF APPEAL.

Parties appeared in person.

Wan Mohamed J. (delivering the Judgment of the Court): This is an appeal by the Appellant from the decision of the Penampang Native Court given on July 30, 1980, whereby the Appellant was found guilty on two charges, viz; (1) Appellant was found to be sitting together with the wife of the Respondent in a car belonging to Respondent's wife at about 12.35 p.m. on July 16, 1980. The car was then parked along the beach at Tanjong Aru; and secondly, (2) that the Appellant was found together with the Respondent's wife in Respondent's house when Respondent was not in at about 10.00 p.m. at Kampong Gunsing, Penampang, on July 22, 1980.

Appellant was then sentenced to six months' imprisonment and "sugit" of two buffaloes, or a sum of $1,000.00 to be paid to the Respondent and in default of paying "sugit" Appellant was to serve four months' imprisonment.

The appeal against the decision of the Penampang Native Court was brought before the District Officer at Penampang, and the District Officer having satisfied with the judgment dismissed the appeal on September 9, 1980.

The Appellant is dissatisfied with both the decisions and lodged an appeal to the Native Court of Appeal on the following grounds which can be summarised as follows:–

(1) That the hearing in the Native Court was conducted contrary to the rule of natural justice;

(2) That the District Officer in hearing the Appellant's appeal from the Native Court Penampang did not comply with the rule of natural justice;

(3) That the Native Court had no jurisdiction to try the Appellant, who is a Muslim, and that the offences alleged to have been committed were offences which come under the Administration of Muslim Law Enactment Sabah, 1977;

(4) That the Native Court failed to obtain the sanction of the District Officer before or at the time of instituting the proceedings against the Appellant who is not a Native in accordance with section 5(1)(b) of the Native Courts Ordinance.

In his written submission and affidavit the Appellant had put in lengthy arguments as to the conduct of the proceedings both in the Native Court at Penampang and the appeal proceedings before the District Officer. Among others, he submitted that he was not properly tried and given proper opportunity to defend the charges against him and that the Respondent was never made to prove his case beyond reasonable doubt before he was called to enter his defence. Appellant also submitted that the adjudicators of the Native Court and the District Officer were biased throughout the proceedings.

(The Native Court of Appeal on going through the Notes of Evidence recorded by the Native Court and the District Officer found that there was no breach of the rule of natural justice).

He also submitted that he was not given sufficient time to prepare his defence both in the Native Court and at the hearing of his appeal before the District Officer.

On the above points raised by the Appellant, we find that these are points of procedure which the Native Court of Appeal will not be able to entertain by virtue of section 10.B(2) of the Native Courts Ordinance which reads:–

"No order shall be varied or declared void solely by reason of any defect in procedure or want of form."

It is also to be noted that there is no specific rule or procedure to be complied with by the Native Court. The Appellant is out of point when he expected the trial in the Native Court to be anywhere similar to that of the Magistrates Court or any Court under the Courts of Judicature Act and the Subordinate Courts Act. What is said by the Appellant in his submission that the proceedings against him is in breach of the rule of natural justice is in fact only a departure from the normal procedure of the Magistrates Court and other Courts in the same series. We find that there was no breach of the rule of natural justice as the Appellant was given opportunity to be heard.

The mode of inquiry or proceedings is left entirely in the hands of adjudicators of the Native Court in accordance with the custom or usual practice which is never codified or spelt out. Section 6 of the Native Courts Ordinance provides:–

"The practice and procedure of Native Courts shall be regulated in accordance with Native Law or custom."

The same applies to the mode of proceedings of an appeal from the Native Court to the District Officer.

On the question of jurisdiction raised by the Appellant that the Native Court has no jurisdiction over Muslims since the introduction of the Administration of Muslim Law Enactment Sabah, 1977, which came into force on December 29, 1977, and his submission that the two offences alleged to have been committed are offences of close proximity *(khalwat)* and illicit intercourse *(zina)* which come under sections 101(1) and 102(3) respectively of the said Enactment, we find as of fact that in the first case or charge the offence was alleged to have been committed by the Appellant and Respondent's wife before they embraced or converted to Islam. The Native Court therefore had jurisdiction over the Appellant who was not at the material time a Muslim.

Regarding the second charge, it is alleged that the Appellant and Respondent's wife were found together in the house of the Respondent a day after their conversion to Islam. According to the record available Appellant and Respondent's wife embraced Islam and became Muslims on July 21, 1980, and they were alleged to have committed the second offence on July 22, 1980. Respondent's wife in her evidence before the Native Court had stated that she embraced Islam in order to enable the Appellant to marry her and this also implied that she would automatically be divorced from her husband and the same applies to the Appellant.

The general principle of Islamic Law is that if a husband or wife were to embrace Islam and his/her spouse refused within three months and ten days to be converted to Islam after being offered to embrace Islam, the marriage of such husband or wife is dissolved. However, there must be an adjudicating order or a declaration of such dissolution of marriage on account of the refusal of the spouse to embrace Islam.

In the present case there is no evidence of an adjudicating order or declaration made as to the dissolution of marriage between Respondent and his wife. At any rate, it is impossible for an adjudicating order or declaration to be made a day after Respondent's wife embraced Islam. The Native Court of Appeal therefore find that Respondent and his wife at the material time legally remain to be husband and wife. The Respondent would therefore have the right to lodge the complaint in respect of the second charge against his own wife and the Appellant, especially where the offence was alleged to have committed in his own house. It is therefore held that the Native Court has jurisdiction over the Appellant in respect of the second charge.

The offence alleged to have been committed in the second charge is not that of *"khalwat"* under the Administration of Muslim Law Enactment Sabah, 1977, but it is an offence in breach of Native Custom, viz; that Appellant was alleged to be found together with the wife of the Respondent at about 10.00 p.m. in the house of the Respondent while the Respondent was away and that there was no other adult person or close relative of Respondent's wife or that of the Respondent.

The next important point raised by the Appellant was that the Native Court has failed to obtain sanction of the District Officer to the institution of proceedings against him who is not a Native, as provided under section 5(1)(b) of the Native Courts Ordinance (Cap. 86). The law is silent as to whether or not the sanction must be in writing. However, we find as of fact that there is no record that sanction was given by the District Officer as required by the aforesaid provision. The District Officer has indeed stated in his ground of decision

that he had given verbal sanction and it is also observed that he had written a letter to the Immigration Authority, Kota Kinabalu, requesting the latter to withhold the issuance of travel documents to the Appellant until the case is completed All these facts cannot be taken as sufficient proof that sanction was given by the District Officer as required by the provision of section 5(1)(b) of the aforesaid Enactment.

We refer to the *Native Court of Appeal at Kota Kinabalu No. 1 of 1973, B.M. Harley* v. *Onong binte Ah Hing*[1] before Seah J. (President), Datuk Hj. Abdul Wahid Wee (Member) and Matimbun bin Majangkin (Member), the date of Judgment September 26, 1974. The relevant part found on page 171 of the book "Cases of Native Customary Law in Sabah" compiled by Tan Sri Datuk Lee Hun Hoe reads as follows:–

"In *Gokulchand Dwarkadas Moraka* v. *The King* as reported in *A.I.R. 1948* at *page 82,* the Privy Council had to decide the sufficiency of a sanction to prosecute under the Cotton, Cloth and Yarn (Control) Order, 1943. Section 23 of the Order provides that no prosecution for the contravention of any of the provisions of the said Order shall be instituted without the previous sanction of the Provincial Government or any such officer of the Provincial Government not below the rank of district magistrate as the Provincial Government may by general or special order in writing authorise on his behalf. The relevant part of the sanction to prosecute reads:–

'Resolution: Government is pleased to accord sanction under clause 23, Cotton, Cloth and Yarn (Control) Order, 1943, to the prosecution of Mr. Gokulchand Dwarkadas Morarka for breach of the provisions of clause 18(2) of the said Order.

By Order of the Governor of Bombay

(signed)
Deputy Secretary to Government Bombay

To: The District Magistrate, Sholapur.

"At page 84 Sir John Beaumont who delivered the judgment of the Privy Council said:–

'In Their Lordships' view, in order to comply with the provisions of clause 23, it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the facts should be referred to on the face of the sanction, but this is not essential, since cl. 23 does not require the sanction to be in any particular form, nor even to be in writing. But if the facts constituting the offence charged are not shown on the facts of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority. The sanction to prosecute is an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. They are not, as the High Court seem to have thought, concerned merely to see that the evidence discloses a *prima facie* case against the person sought to be prosecuted. They can refuse sanction on any ground which commends itself to them, for example, that on political or economic grounds they regard a prosecution as inexpedient. Looked at as a matter of substance, it is plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case. Nor, in their Lordships' view, is a sanction given without reference to the facts constituting the offence a compliance with the actual terms of clause 23. Under that clause sanction has to be given to a prosecution for the contravention of any of the provisions of the Order. A person could not be charged merely with the breach of a particular provision of the Order; he must be charged with the commission of certain acts which constitute a breach, and it is to that prosecution – that is, for having done acts which constitute a breach of the Order – that the sanction is required. In the present case there is nothing on the face of the sanction and no extraneous evidence, to show that the sanctioning authority knew the facts alleged to constitute a breach of the Order, *and the sanction is invalid.*

Similar views were held in:– *Public Prosecutor* v. *Oie Hee Koi & Associated Appeals*[2] *Yek Tieng Sing & Ors.* v. *Public Prosecutor*[3]; *Thorpe* v. *Priestnall*[4].

This Court holds the view that some form of procedure is required before such sanction can be given or refused. The District Officer, for instance, must be informed of the person to be charged and he must also be informed of the facts in the allegation before he could exercise his discretionary power either to grant or refuse the sanction.

Since the grant of a valid sanction of the District Officer is a condition precedent to the institution of legal proceedings in the Native Court under section 5(1)(b) of the Native Courts Ordinance (Cap. 86) where one party to the proceedings is not a native within the meaning of the Interpretation (Definition of Native) Ordinance (Cap. 64) and the provision of subsection 4 of section 5 of the Native Courts Ordinance, we rule that having regard to our finding the proceedings in the Penampang Native Court dated July 16, 1980, are null and void. Under the circumstances, we have no alternative but to set aside the purported decision of the said court.

Appeal allowed.